No. 15,690

United States Court of Appeals

For the Ninth Circuit

SUNSET-STERNAU FOOD CO., a corporation, *Appellant,* vs. AMERICAN ALMOND PRODUCTS CO., INC., a corporation, *Appellee.*	

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The action is for breach of contract to deliver regular apricot kernels. The default in delivery and the damages suffered are not in controversy. The existence of the contract is the only issue presented by this appeal.

The trial Court has specifically found against appellant upon every point raised. Appellant contends that the evidence is insufficient as a matter of law to support certain of the findings. It is unnecessary to refer to the presumptions in favor of the findings or their conclusiveness on appeal if supported by substantial evidence.

CONTENTIONS OF APPELLANT.

The contentions of appellant are set forth on pages 3 and 4 of the opening brief. They are stated as follows:

"1. The evidence fails to show the existence of any contract because

(a) there was not, at any time, an offer and acceptance with respect to all given terms and hence no meeting of the minds with regard to material terms of the alleged contract.

(b) the alleged contract was subject to approval by appellee of a sample submitted by appellant of the merchandise involved—and this sample was not approved by appellee.

(c) Trade custom and usage were relied upon to supply an important and material part of the alleged contract and the evidence discloses that appellee did not rely upon such trade custom and usage but demanded it be made a part of the written contract—which was not done. Also appellant was not aware of such trade custom and usage.

(d) A contract was to be created only by a formal contract of appellant, to be executed by both appellee and appellant and that appellee refused to execute the same when it was presented for execution.

(e) There was no unequivocal acceptance by appellee of any offer made by appellant.

2. The evidence shows that Prince, Keeler & Co. Inc. who issued the 'Bought—or Sold Note' relied upon as the contract in this case, was a food broker only, and did not possess the rela-

tionship of agent for appellant in any manner sufficient to enable them to bind appellant to this alleged contract, or any contract required by the Statute of Frauds to be in writing."

All of the foregoing contentions are in direct conflict with the following findings (Tr. pp. 39-42):

> "3. That on or about the 1st day of September, 1955, defendant agreed to sell to plaintiff, and plaintiff agreed to purchase from defendant, approximately 75 tons of regular apricot kernels, 1955 crop, packed in 100 lb. net bags, Sunset brand, at 17½¢ per pound, f.o.b. west coast dock, terms, less 2%—2 days' sight draft, shipment from California, half the quantity about October 31, 1955, balance about November 30, 1955. That said sale was made subject to approval by buyer of two bags of apricot kernels then enroute as samples.
>
> 4. That said purchase and sale was negotiated through Prince Keeler & Co. Inc. of New York, acting as broker. That on or about said first day of September, 1955, said Prince Keeler & Co. Inc. acting as broker and as agent of both seller and buyer, issued and signed a written memorandum of said sale, one signed copy of which, designated as 'bought note', was delivered to and received by plaintiff, and one signed copy of which designated as 'sold note', was delivered to and received by defendant. That said bought and sold notes fully set forth the terms of said sale. That said memorandum further sets forth that the sale is subject to confirmation of seller and approval of sample by buyer. That it further recites, "This memorandum shall be subordinate to a more for-

mal contract if and when such contract is executed; in the absence of such contract, this memorandum represents the contract of the parties."

5. That the two bag sample of apricot kernels was received by plaintiff from defendant on or about the 8th day of September, 1955. That on on or about said 8th day of September, 1955, plaintiff examined and approved the said sample and notified Prince Keeler & Co. Inc. of said approval. That on the same day Prince Keeler & Co. Inc. by letter informed defendant that plaintiff had approved the sample.

6. That defendant confirmed said sale, and repeatedly, both orally and in writing, recognized and ratified the said contract of sale, and likewise in writing ratified the act and authority of Prince Keeler & Co. Inc. in executing the memorandum of sale on its behalf.

7. That there is and for many years prior to the commencement of this action has been, a general and well established trade custom and usage among those engaged in the California apricot kernel trade, that the term "regular apricot kernels" means, identifies and describes apricot kernels in any delivery of which the broken kernels shall not exceed 5% by weight. That according to trade practice, said tolerance of broken kernels is sometimes set forth in contracts of sale of regular apricot kernels and sometimes it is not set forth, but when not set forth it is implied. That the sample of apricot kernels submitted by defendant to plaintiff was a type sample representative of quality and had nothing to do with the quantity or percentage of broken kernels that would be present in any delivery under the con-

tract. That said trade custom and usage is a part of the contract of sale by defendant to plaintiff.

8. That it was not intended by the parties that the existence of a contract should be dependent on the execution of a formal contract; that no formal contract was ever executed and that the broker's memorandum constitutes the contract of the parties.

9. That from and after the first day of September, 1955, and until November 16, 1955, defendant, both orally and in writing, repeatedly promised and assured plaintiff that it would make delivery under said contract. That from the first day of September, 1955, until the 16th day of November, 1955, the market price of regular apricot kernels, 1955 crop, f.o.b. west coast dock, gradually rose from 17½¢ per pound, and which was the market price on September 1, 1955, to 43¢ per pound which was the market price on November 16, 1955. That plaintiff relied upon the promises and assurance of defendant to its detriment. That defendant for the first time refused to make delivery on November 16, 1955, and at which time the market price had risen to 43¢ per pound, far in excess of that price at which plaintiff could and would have purchased said regular apricot kernels if not led to believe that defendand would perform the contract. That defendant is by its conduct estopped to rely upon the statute of frauds as defense in this case and estopped to deny the existence of the contract.

10. That from and after the first day of September, 1955 until the 16th day of November, 1955, the defendant repeatedly and consistently promised and assured plaintiff that it would de-

liver the 75 tons of regular apricot kernels and fulfill the terms of said contract. That on November 16, 1955, defendant for the first time refused to perform said contract and refused to make delivery of any of the regular apricot kernels called for by said contract. That at the time of said refusal the market price of regular apricot kernels, 1955 crop, f.o.b. west coast dock, was 43¢ per pound."

THE FINDINGS ARE SUPPORTED BY THE EVIDENCE.

Not only is there substantial evidence in the record to support the findings but any inconsistent finding would have been contrary to the weight of the evidence. We shall first review the evidence and then consider severally the contentions urged.

In reviewing the evidence, attention is particularly directed to the conduct of appellant following the issuance of the memorandum of sale by the broker. The repeated, definite and complete recognition of the existence of the contract refutes the contentions that there was not a meeting of minds; that there was not an approval of the sample; that a contract was dependent on the execution of a formal written agreement. There was ratification in writing that fully satisfies the requirements of the Statute of Frauds. There were repeated promises of performance relied upon by appellee, to its detriment, that would create an estoppel for appellant to rely upon the Statute of Frauds as a defense.

Prince, Keeler & Co. Inc. had acted as broker for appellant in the metropolitan New York area for a number of years (R. 72). In July, 1955, Sydney Sternau, President of appellant, went to New York and in company with a representative of Prince, Keeler & Co. Inc. called upon Mr. Kaplan, Secretary of appellee, in an endeavor to interest appellee in the purchase of 75 tons of regular apricot kernels (R. 73-74; 150-152). Apricot kernels are obtained from apricot pits which are first dried, then cracked and the shells separated from the nut meat or kernel. There are three types of apricot kernels—regular apricot kernels which are obtained from the pits of apricots that are dried; steamed apricot kernels which are obtained from apricots that are cooked for canning, pulp or juice, and the pits of which have been subjected to hot steam; and sulphured kernels which are obtained from apricots which have been sulphered and in which process both the fruit and pits have been exposed to sulphur (R. 145-149).

At the time Mr. Sternau called upon Mr. Kaplan opening prices had not been announced and Mr. Sternau assured Mr. Kaplan that the price asked would be competitive (R. 73, 80, Ex. 2, R. 79). At the time of this conversation, Mr. Sternau had with him a small sample of apricot kernels, which he showed to Mr. Kaplan. The sample was too small for Mr. Kaplan to judge of the quality, and he asked that he be supplied with a type sample of 200 lbs. so that he could make a test run in his plant. Appellee is in the business of processing the kernels and making them into a paste, which is sold to bakers and confectioners

and primarily used as a filler for making macaroon cookies (R. 146).

Following this conversation there was follow-up correspondence between the appellant and its broker in which appellant encouraged the broker to do all it could to negotiate the sale, and promised to forward the requested sample (Exs. 1-4, R. 75, 79, 82-84).

At the end of August, 1955, the broker wired appellant that opening prices for apricot kernels had been announced and that appellee had offered to pay 17¢ per pound (Ex. 5, R. 85). On the same day, August 31, 1955, appellant wired back that the price was 18¢ and also that the 200 pound sample had been shipped on that date (Ex. 6, R. 86). On September 1, 1955, a telephone conversation was held between William Berke of Prince, Keeler & Co., Inc. and Steve Tarrico, of appellant, in which a price of 17½¢ was authorized by appellant. This offer was communicated to appellee on the same day and accepted.

On the same date, September 1, 1955, Prince, Keeler & Co. issued its bought and sold notes or memoranda of sale covering the transaction and delivered a bought note to appellee and mailed a sold note to appellant. Exhibit 7 (R. 88), a letter from Prince, Keeler & Co. Inc. to appellant, confirms the telephone conversation with Steve Tarrico, the offer to appellee and its acceptance and encloses the sold note. With respect to this sold note, the letter states:

> "With regard to shipping and packing—this is designated on *enclosed contract* which we believe will meet with your approval.

If there are any further questions on this—do not hesitate to contact us.

We certainly are glad to be able to *close this business* and thank you for your cooperation."

The sold note mailed to appellant is Ex. 8 (R. 89) and the bought note is Ex. 13, (R. 107). Although one is designated as "sold note" and the other "bought note", the two are identical. The notes recite that the sale is "subject to approval by buyer of two bags now enroute as samples to buyer". It further recited "this memorandum shall be subordinate to a more formal contract if and when such contract is executed. In the absence of such contract this memo represents the contract of the parties".

The 200 lb. sample was received by appellee. Appellee made a test run of the nut meat and found it to be of satisfactory quality. At the same time appellee noted that the sample contained in excess of 5% of broken kernels.

On the same day, September 8, 1955, in a telephone conversation, Mr. Kaplan told Mr. Sullivan of Prince, Keeler & Co. Inc. that the quality of the sample was satisfactory but observed that the percentage of broken kernels in the sample exceeded the tolerance permissible in a delivery of regular apricot kernels. In this same conversation Mr. Sullivan stated that he had received formal contracts from appellant. Mr. Kaplan told Mr. Sullivan that it was the custom of the trade that regular apricot kernels must not contain more than 5% by weight of broken kernels, that this

was sometimes expressed and sometimes implied, but always applicable. Mr. Kaplan stated that he would prefer that it be expressly stipulated in the formal contract as this was his first transaction with appellant (R. 159-160, 283-284, 298-300).

At this point a correction must be made in appellant's statement of facts. On page 18 of its opening brief appellant alleges that appellee demanded that the broker's note be modified to include the clause "Merchandise not to exceed 5% of broken kernels". This is a misstatement, as is clearly disclosed by the testimony. The request referred exclusively to the formal contract that had been forwarded by appellant to the broker (R. 160, 214-215). At page 214, the following question was asked by counsel for appellant on cross-examination of Mr. Kaplan and the following answer given:

> "Q. So you did advise Prince-Keeler then to add that clause on to the so-called bought note of September 1st, did you not?
>
> A. I did not."

On September 8, 1955, the broker wrote appellant advising of the approval of the sample by appellee and returned the formal contracts together with appellee's request that the tolerance clause be inserted. This letter is Exhibit 10. A copy of the formal contract which was returned with Exhibit 10 (R. 94) is Exhibit 9 (R. 90).

Appellant had received and retained the sold note without objection. It received the broker's letter of September 8 with the returned formal contracts with-

out protest or comment. It did not dispute that the 5% limitation of broken kernels was a recognized custom of the trade, as set forth in the broker's letter, and according to the testimony of Mr. Sternau, appellant simply retained all copies of the formal contract in its possession. It is also to be noted that appellant accepted the statement of the trade custom as set forth in the letter of September 8th without making any inquiry to ascertain or verify the accuracy of the recitals pertaining to the custom (R. 96, 316-318).

At this point it should also be mentioned that although appellant would have the court believe that appellant was ignorant of this trade custom because it was its first sale of apricot kernels, on cross-examination of Mr. Sternau it developed that appellant had for a period of ten years been engaged in the same business as that of appellee in making paste from apricot kernels and had made innumerable purchases of this commodity (R. 313-316).

Appellant made no reply whatsoever to Prince, Keeler & Co. Inc. after receipt of the letter of September 8, 1955, until September 21, 1955. At that time appellant wrote Exhibit 11 (R. 98) which reads as follows:

> "Dear Bill:
>
> We just had the packer in who was going to shell the apricot kernels and he advised me that he cannot guarantee 5% pieces, that they cannot be any better than the sample. He is having a very difficult time in shelling these and would like *to get out of this contract* this season. Please advise us if you are able to do it. It will be a

> personal favor if it is possible to assist this man in setting up his plant the right way. Please advise me by Monday about this."

It is to be observed first that there is a tacit acceptance of the contents of the letter of September 8th. It is to be observed further, that there is a definite recognition of the existence of the contract, which necessarily would not exist if it depended upon the execution of a formal contract, if there had not been a ratification of the sale or if there had not been an approval of the sample.

On the taking of his deposition, Mr. Sternau was asked this question: "*This contract* that you refer to in this letter is the contract with the American Almond Products Co. for 75 tons of apricot kernels? A. Yes." (R. 99). Three days before this letter of September 21, 1955, was written, and in which appellant sought to get out of the contract, a fire had occurred at the plant of Sewell, Brown & Co. in which large quantities of apricot kernels had been destroyed and this was the reason appellant and Bonzi, with whom appellant was associated, wanted to get out of the contract. At this point we would respectfully direct attention to the cross-examination of Mr. Sternau with reference to the contents of this letter. It appears that the packer to whom he refers is Mr. Bonzi, whose business is that of gathering cannery refuse. The statement that this "packer" was having a difficult time in shelling these apricot kernels is deliberately false, as Bonzi had never shelled any kernels

and was not equipped to shell any kernels (R. 319-320).

Although Mr. Sternau testified that he did not know about the fire at the time that he wrote this letter, we respectfully call attention to his conflicting and evasive testimony on cross-examination (R. 321-322). It is perfectly obvious that if a fire of this magnitude occurred, Mr. Sternau would have been advised of it and Mr. Bonzi would have been advised of it.

The fire had occurred on Sunday, September 18, 1955 and Mr. Kaplan learned about it on Monday morning, the 19th of September (R. 164). Realizing its importance, Mr. Kaplan at once left New York for California and arrived at about September 21st (R. 165). After his arrival, Mr. Kaplan had a telephone message from Mr. Berke, of Prince, Keeler & Co. Inc. in which Mr. Berke read to Mr. Kaplan over the telephone Mr. Sternau's letter of September 21, 1955, Exhibit 11, (R. 167). At the request of Mr. Kaplan Mr. Berke mailed to appellee a copy of this letter (See Ex. 38, R. 168). After this telephone message from Mr. Berke Mr. Kaplan telephoned to Mr. Sternau. The substance of this telephone conversation appears at pages 170-171 of the transcript. The conversation is corroborated by George Wright (R. 141). Mr. Kaplan told Mr. Sternau that if it would be of assistance to him he could probably get the cracking done by California Packing Corporation or Rosenberg Bros., and Mr. Sternau stated that he would very much appreciate it if that was done. Mr. Kaplan thereupon got in touch with Mr. Carroll Glenny of the California

Packing Corporation and within an hour after the first telephone conversation with Mr. Sternau, telephoned to him again and advised him that he had obtained the cooperation of the California Packing Corporation to do the cracking at a toll and labor charge, and that Mr. Glenny had requested that Mr. Sternau contact the plant manager of California Packing Corporation, Mr. Engell, to finalize the charge and the date of cracking. Mr. Sternau told Mr. Kaplan that he was very appreciative of what he had done and assured him that appellee would get delivery of the kernels (R. 173). Mr. Kaplan reported to Prince, Keeler & Co. what had been done in this respect, and on September 28, 1955, Mr. Astrack, of Prince, Keeler & Co. wrote Mr. Sternau Exhibit 12 (R. 105), which sets forth and confirms in detail the arrangements that Mr. Kaplan had made on behalf of appellant with California Packing Corporation. We also call attention to the following language in Exhibit 12:

> "It is understood, due to the fact that you have no shelling facilities for apricot kernels, that it has been arranged thru the kindness of Mr. Carroll Glenny of Cal. Pak. for Mr. Engell, Cal. Pak.'s plant manager, to shell the apricot kernels *which we sold American Almond for your account.*"

No reply was made by appellant until on October 12, 1955, Mr. Sternau wrote Exhibit 13 (R. 107) to Prince, Keeler & Co. Inc. in which he refers to the arrangement made with Cal. Pak.:

> "The same thing goes for the American Almond Products. They are doing us no favor in getting

> Cal. Pak. to shell the apricot kernels. They are doing themselves a favor because they *bought them* at a low price and they wanted delivery."

Notwithstanding Exhibits 12 and 13, Mr. Sternau denied having any recollection of any telephone conversations with Mr. Kaplan and any arrangements made by Mr. Kaplan with California Packing Corporation (R. 103-107).

Under date of October 21, 1955, Prince, Keeler & Co. sent appellant the following telegram (Ex. 14, R. 108):

> "American Almond insists on knowing when you are delivering apricot kernels per our order 9-12079 *which was confirmed by you.*"

Appellant made no reply to this telegram (R. 110). On October 25, 1955, appellee wrote Exhibit 15 (R. 111) to appellant which refers to "our contract for apricot kernels of 9/1/55", recites the arrangements made with California Packing and asks what arrangements appellant has made to have the cracking done and to make delivery. Although this letter asks for a prompt reply, no reply was made to it (R. 112).

On October 26, 1955, Prince, Keeler & Co. wrote appellant Exhibit 16, (R. 113) in which it refers to the "double work, double talk and reconfirming on apricot kernels".

Under date of October 31, 1955, appellant replied to Prince, Keeler's letter of October 26, 1955, (Ex. 16). In this letter of October 31, 1955, (Ex. 17, R. 113) appellant writes:

"In reply to your letter of October 26, wish to advise you and you can advise American Almond Products Co. that we are trying to get the commitment from the man with whom we are working on the apricot kernels. We have not written you because we have nothing to tell you. We have called this man on the telephone every day for the past ten days asking him to come to the office but he has not done so and today we are turning the matter over to Mr. O'Connor to try to get a commitment from this man. We acted in good faith and I know the buyer bought in good faith, and that you sold in good faith, and we are going to do everything possible to get this matter settled within the next ten days."

It is difficult to conceive of a more complete recognition and ratification.

Prince, Keeler & Co. Inc. informed appellee of this promise, (Exhibit 29, p. 1, R. 130) and appellee agreed to wait the ten days (Exhibit 40, R. 180).

On November 3, 1955, Prince, Keeler & Co. Inc. replied to appellant's letter of October 31, 1955, as follows:

"We have your letter of October 31st, regarding American Almond Product's apricot kernels. We appreciate your problem, and so does American Almond Products, but as the buyer pointed out, and we have to agree with him, he did not buy from 'some man', he bought the kernels from a reliable house, namely, Sunset-Sternau Food Company." (Ex. 20, R. 121.)

Mr. Raymond J. O'Connor is both Chairman of the Board and attorney for appellant (Ex. 17).

At the request of Mr. Sternau, President of the company, Mr. O'Connor wrote several letters to Rudy Bonzi, in which the contract with appellee is expressly recognized and liability admitted. In Ex. 18 (R. 120), Mr. O'Connor writes:

> "This office represents Sunset-Sternau Food Company in Modesto. We have been advised that you authorized the Company to sell on your behalf eighty-five tons of shelled apricot kernels.
>
> *The Company has made the sale per your instructions at seventeen and one-half cents per pound. The buyer is requesting that they be advised of the shipping date.*
>
> *Efforts to reach you apparently have been unavailing for the past week. It is absolutely essential that you get in touch with the Company upon the receipt of this letter to complete this transaction. If this is not done it will expose both the Company and yourself to liability on the sale with the right of the Company to go against you for any losses that may be sustained by reason of non-delivery.* Will you, therefore kindly get in touch with the company immediately upon receipt of this letter."

Under date of November 3, 1955, Mr. O'Connor again wrote a letter of similar import to Rudy Bonzi, which is Exhibit 23 (R. 123).

On November 4, 1955, Mr. Sternau wrote Exhibit 24, (R. 124) to Prince, Keeler & Co., Inc., in which it is stated:

> "We have turned over to Mr. O'Connor all the information we have regarding the *sale* of apri-

> cot kernels and we have placed it all in his hands. Be assured that we will cooperate in every way possible with American Almond Products *to get delivery.*"

On November 7, 1955, Prince, Keeler & Co. sent a copy of the foregoing letter to appellee, (Ex. 41, R. 181).

On November 11, 1955, Mr. O'Connor wrote Exhibit 28, (R. 127) to Prince, Keeler & Co. Inc. again referring to the contract and suggesting that a letter be written directly to Bonzi.

Just as appellant repeatedly recognized the existence of the contract, likewise did appellee (See Exs. 14, 15, 19, 20, 22, 26, 40) (R. 108, 111, 121, 121-122, 125, 180).

After successive promises of appellant to make delivery failed to materialize, Mr. Kaplan, on November 14, 1955, again came to California (R. 181). On November 14, 1955, Mr. Kaplan had a telephone conversation with Mr. Sternau in which Mr. Sternau promised delivery, and stated that he was having difficulties with Bonzi (R. 185-186). On the same day, Mr. Sternau wired Prince, Keeler & Co. Inc. that he had had a very nice talk with Mr. Kaplan. (Ex. 29, R. 130).

The following day, November 15, 1955, Mr. Kaplan and Mr. Eisner, attorney for appellee, went to San Jose and met with Mr. Sternau. Mr. Sternau stated that Bonzi had in his possession the uncracked pits from which the kernels could be delivered (R. 187).

On the same day a meeting was held in the office of the attorneys for Bonzi in San Jose at which both Mr. Sternau and Mr. Bonzi were present (R. 187-190). After lunch on the same day, another meeting was held in the office of Mr. Sternau, and at which Mr. Bonzi was present. Mr. Bonzi telephoned the California Packing Corporation for the purpose of getting a price for the crackout of the kernels. Mr. Carroll Glenny was not in and Mr. Bonzi stated he would contact Mr. Glenny the following morning, November 16, 1955 (R. 191).

On November 15, 1955, Mr. Kaplan left for New York.

On November 16, 1955, Mr. O'Connor advised Mr. Eisner that delivery would not be made (R. 332) and thereupon Mr. Eisner so advised Mr. Kaplan. This was the first time that appellee received notice or information directly or indirectly, that delivery would not be made (R. 193). The notification from Mr. O'Connor came after attorneys for Bonzi had written appellant Exhibit 32, refusing to crack the kernels or make delivery.

ARGUMENT.

The repeated recognition and ratifications of the contract made by appellant in writing, as well as orally, constitute a complete answer to the contentions urged on this appeal. They demonstrate that everything necessary to the creation of a contract binding appellant to make delivery had occurred. There must have been a meeting of minds, the sample

must have been approved, and it could not have been intended that the existence of the contract should be dependent upon the execution of a formal agreement. Otherwise, there would not have been either recognition or ratification.

IN ISSUING THE BOUGHT AND SOLD NOTES, PRINCE, KEELER & CO. INC., AS BROKER, ACTED AS THE AGENT OF BOTH SELLER AND BUYER, AND APPELLANT HAS IN WRITING RATIFIED ITS ACTION.

"A broker who negotiates a sale of goods, wares and merchandise is an agent of both parties for the purpose of making and signing a memorandum of the contract of sale."

37 *C. J. S.,* page 705.

"The sale was made through a broker, and the terms thereof stated in a broker's note received personally by plaintiff, and a duplicate copy mailed to defendant, which he claims was never received.

The learned trial court at the close of plaintiff's case dismissed the complaint for lack of proof, which ruling we conclude constitutes reversible error. There was not alone ample proof to warrant the inference of receipt by plaintiff and defendant of the broker's note, which in itself may be a valid contract of sale (*Newberry v. Wall,* 84 N. Y. 576), but there was proof, also, of a ratification thereof by defendant personally to plaintiff and admission of inability on his part to perform the same."

Thomas Henderson & Co. Inc. v. Baron, 164 N. Y. Sup. 697.

Under the laws of the State of New York, a broker's memorandum is sufficient even if there be no written authorization or ratification. In California, however, Section 2309 of the Civil Code requires that the authority of an agent to enter into a contract required to be evidenced in writing, must also be in writing. This Honorable Court had occasion to consider a broker's memorandum and this particular section in the case of *Georgia Peanut Co. v. Famo Products Co.* reported in 96 Fed. 2d 440. The decision recognizes that in issuing a memorandum of sale the broker acts as agent of both buyer and seller, but that in order to comply with the Statute of Frauds of the State of California there must be either written authorization or written ratification of the broker's authority. In the case cited there was neither. The evidence in this case clearly proves the written ratification.

When Prince, Keeler & Co. Inc. forwarded the sold note to appellant, it referred to the document as the "contract", and the transaction as closed by its issuance (Ex. 7, R. 88). Appellant retained this "contract" without objection.

The undisputed testimony (R. 205, 218) is that it is the usual practice for such a broker's memorandum to be the sole evidence of a contract. In fact, brokers' memoranda in form identical to that issued in this case by Prince, Keeler & Co. Inc., and which were the sole evidence of the contracts, have been introduced into evidence (R. 294-296). Appellant itself developed that the bought and sold notes in this case are "the usual type of bought and sold notes used in New York City" (R. 287). Appellant conceded that

Prince, Keeler & Co. Inc. as broker, represented both parties to the transaction, but offered to prove that appellant had given special instructions to Prince, Keeler & Co. Inc. not to use the form of the ordinary bought and sold note used in New York City in connection with appellant's transactions (R. 292). Appellee objected to the introduction of such testimony and the Court properly sustained the objection (R. 291-294).

We have already indicated that appellant seeks to give the erroneous impression that appellee did not accept the bought note in the form in which it was issued, but wanted to modify the note by having inserted a clause that broken kernels should not exceed 5% by weight. (Opening Brief pp. 18-19). This assertion is not true (R. 160, 213-214). The request was made solely with respect to the proposed formal contract, which was returned to appellant by Prince, Keeler & Co. Inc. and retained by appellant without ever again requesting or suggesting that a formal contract be signed, and without ever disputing that the 5% tolerance clause was applicable. Only the proposed formal contract No. 2023 prepared by appellant was returned by the broker (Ex. 10, R. 94). The sale, as evidenced by the broker's memorandum, was confirmed and ratified in writing by appellant. The evidence of such repeated recognition, confirmation and ratification has already been set forth. More definite recognition and ratification can scarcely be imagined. There is no room for argument.

Ratification of the act of an agent is in all respects equivalent to prior authorization. The written recog-

nition and treatment of a contract executed by an agent as in force and effect is a compliance with the Statute of Frauds to the same extent as if the agent had prior written authorization.

The case of *Kelley-Clarke Company v. Leslie,* 61 Cal. App. 559, 563-4, 215 Pac. 699, 701-702, is directly in point:

> "3. The second point is that there is no memorandum signed by defendants or their authorized agents, and that the contract is therefore void by reason of the statute of frauds. The record clearly shows a contract entered into between plaintiff and defendants through Davis in San Francisco and the Continental Brokerage Company in Chicago. It is the law that a complete contract, binding under the statute of frauds, may be gathered from letters, writings, and telegrams between the parties relating to its subject matter and so connected with each other that they may fairly be said to constitute one paper relating to the contract. (*Elbert v. Los Angeles Gas Co.,* 97 Cal. 244 (32 Pac. 9).)
>
> 4. Conceding that the telegrams contain all of the elements of a contract, nevertheless defendants contend that the contract yet lacks the greatest essential, to wit, the signature of the parties to be charged, either by the parties themselves or someone shown to be authorized by them. (Sec. 2309, Civ. Code.) By their signed telegram of August 5th, quoted above, defendants *treated* the contract as one made for them with plaintiff. Signed telegrams and letters between the parties incorporated by reference the previous telegrams constituting the contract. Defendants neither denied the contract nor repudiated the acts in

their behalf of the Continental Brokerage Company. In a letter written by defendants to plaintiff on August 14th, before the goods arrived in Chicago, wherein defendants seek to justify their position of interpreting the contract as one for *immediate shipment,* they say: 'We are sorry that a misunderstanding has arisen *but a contract is a contract.' It will thus be seen that while there was not an express ratification of the effect of the contract expressed in words, there was an express recognition that there was a contract. The uncontradicted evidence is that the respective parties recognized the transaction as one under a contract, the difference between them being as to whether the contract called for 'prompt shipment' or 'immediate shipment.'* As was said by our Supreme Court in *Ballard v. Nye,* 138 Cal. 588, 597 (72 Pac. 156, 159): *'Of course authority must be shown, but it need not be express authority; it may be implied, and one of the recognized legal methods of proving authority is by ratification. From such proofs the law implies previous authority to the same extent as if in the first instance it had been expressly conferred. The doctrine of ratification proceeds upon the theory that there was no previous authority, and that the relation of principal and agent did not in fact exist, but implies it from the acts and conduct of the parties, and when so implied, is equivalent to previous authority, and results as effectively to establish the relation of principal and agent as if the agency had been authorized in the beginning."* (Sec. 2307, Civ. Code: *Quinn v. Dresbach,* 75 Cal. 162 (7 Am. St. Rep. 138, 16 Pac. 762); *Ralphs v. Hensler,* 97 Cal.

301 (32 Pac. 243); *Pope v. Armsby Co.,* 111 Cal. 159 (43 Pac. 589); *Ford v. Lou Kum Shu,* 26 Cal. App. 203 (146 Pac. 199); *Anglo-California Bank v. Cerf,* 147 Cal. 393, 399 (81 Pac. 1080); *Union Trust and Realty Co. v. Best,* 160 Cal. 263, 267 (116 Pac. 737; *Phillips v. Phillips,* 163 Cal. 530, 535 (127 Pac. 346).)

In *Franklin Sugar Refining Co. v. Egerton et al.,* 288 Fed. 698, a letter written by the defendant requesting that shipment be not made, was held to be a sufficient recognition of the contract and a sufficient compliance with the Statute of Frauds.

> "This letter of defendant, read in connection with the letter it answered, is a full recognition and acknowledgment of all the alleged contracts of sale, the number of barrels bought, the basis price of 22½ cents, and the time of delivery, and it meets the demands of the statute as fully as if the original memoranda of sale, including those of September and October, had been signed by the defendants. *A written recognition of the contract, expressed either in one writing or in several taken together, even with the request for release, refusal to perform the contract or the denial of its validity, is sufficient under the statute. Barry v. Coombe,* 1 Pet. 640, 7 L. Ed. 295; *Ryan v. United States,* 136 U.S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447; *Drury v. Young,* 58 Md. 546, 42 Am. Rep. 343; *Louisville Co. v. Lorick,* 29 S. C. 533, 8 S. E. 8, 2 L. R. A. 212; *Colleton Realty Co. v. Folk,* 85 S. C. 84, 67 S. E. 156; *George Lawley & Son v. Buff,* 230 Mass. 21, 119 N. E. 186; 27 Corpus Juris, 257; 25 Ruling Case Law, 643." (p. 702.)

In *Franklin Sugar Refining Co. v. William D. Mullen Co.,* 12 Fed. 2d 885, it was held that letters recognizing the existence of the contract and requesting changes in it, were a sufficient compliance with the Statute of Frauds:

> "*We are clearly of opinion that these papers, signed by the defendant, recognizing the existence of the contract, and requesting changes of it, were a compliance with the statute that 'some note or memorandum in writing of the contract or sale be signed by the party to be charged.'* We therefore hold, which holding is in accord with our holding in *Howell v. Witman-Schwartz Corporation,* 7 F. (2) 513, the court below erred in sustaining the demurrer, and its order must be reversed, and the cause remanded for further procedure in accordance with this opinion." (p. 889.)

In the case of *Howell v. Witman-Schwartz Corporation,* 7 Fed. 2d 513, it was held that an attempted repudiation of an agreement that is referred to will satisfy the statute:

> "Admittedly the defendant in this case did not sign the order itself constituting the contract of sale. It was signed by Fred. B. Townsend Brokerage Co., brokers. If this were all, it might be necessary to show that the Townsend Brokerage Company was the agent of defendant. This might be done; but it is unnecessary, for defendant wrote and signed two letters referring to the contract. *On July 27, 1920, it wrote to plaintiff as follows: 'If possible cancel this car sugar, or if you cannot do this do not ship until last half August. We are loaded with sugar for some time*

and cannot take it now. Please return contract with your reply.' On August 11, 1920, defendant again wrote plaintiff saying: 'Don't ship any sugar until we advise you, we have more now than we can finance.'

While the 'note or memorandum' must be signed by the party charged, the instrument itself need not be signed. *The contract may be so referred to in a letter or paper signed by the party to be charged as to incorporate it therein by internal reference. Title Guarantee & Surety Co. v. Lippincott,* 252 Pa. 112, 97 A. 201; *Franklin Sugar Refining Co. v. Howell et al.,* 274 Pa. 190, 194, 118 A. 109; *Northwestern Consol. Milling Co. v. Rosenberg* (C.C.A.) 287 F. 785; *Beckwith v. Talbot,* 95 U.S. 289, 292, 24 L. Ed. 496; *Ryan v. United States,* 136 U.S. 68, 83, 10 S. Ct. 913, 34 L. Ed. 447. *A letter will incorporate the unsigned contract by internal reference, and bind the defendant, even though he therein disclaims responsibility, if the fact of the consummated agreement appears therein and its terms are recognized. Franklin Sugar Refining Co. v. John,* 279 Pa. 104, 110, 123 A. 685; *Franklin Sugar Refining Co. v. Egerton* (C.C.A.) 288 F. 698, 702.

"The words, 'Please return contract with your reply,' refer to the contract of sale in question which was inclosed in the letter and was the only enclosure in it. The directions to 'Cancel this car sugar. Don't ship any sugar until we advise you' —refer to the sugar embraced in this contract, for plaintiff did not have any other order for the delivery of sugar to defendant. These letters are the clear recognition and adoption of the terms of the contract and the acknowledgment by defendant that it was bound thereby * * *" (p. 514.)

In addition to repeated recognition of the contract, which establishes its validity, appellant is by its conduct estopped to repudiate the contract or rely upon the Statute of Frauds as a defense.

APPELLANT'S RECOGNITION OF THE CONTRACT AND PROMISES TO DELIVER CONSISTENTLY AND REPEATEDLY MADE AND RELIED UPON UNTIL NOVEMBER 16, 1955, ESTOP APPELLANT FROM EITHER REPUDIATING THE CONTRACT OR RELYING ON THE STATUTE OF FRAUDS AS A DEFENSE.

In the case of *George C. Beckwith v. Talbot,* 95 U.S. 289, 24 L.Ed. 496, 498, a contract was unsigned by the defendant but he wrote letters recognizing its existence. The Supreme Court said:

> "We agree with the Supreme Court of Colorado that, in the fact of this evidence, produced by the defendant himself, he cannot deny the validity of the agreement. *His letters are a clear recognition of it. In them he refers to 'the agreement' again and again. He declares his intention to adhere to it, and to hold the plaintiff to it. . . .*" (p. 498.)

While appellant was assuring appellee of its intention to deliver and fulfil the terms of the contract, the market price of regular apricot kernels was constantly rising. On September 23, 1955, shortly after the fire, appellee was able to purchase regular apricot kernels at 28¢ per pound (R. 193) (Ex. 43, R. 259). The price constantly rose until at the time of refusal to deliver, the market price was 43¢ per pound. If it had not been for the promises and assurances of

appellant, appellee could and would have covered its requirements at the lower prices (R. 195). The conduct of appellant has caused appellee to act to its detriment in reliance thereon, and upon well established principles an estoppel results.

The case of *Moore v. Day,* 123 Cal. App. 2d 134, 140-141, 266 Pac. 2d 51, 55, is directly in point. In fact, it is on all fours, except that in that case it was the buyer who led the seller to believe that it would take delivery instead of the seller leading the buyer to believe that delivery would be made. In the meantime the market went down, and when the buyer refused to take delivery the price was substantially less than the seller could have received if he had not refrained from selling because of the defendant's promises. The principle involved is identical.

In the *Moore* case the Court said:

> "Applying the well-settled principles hereinbefore set forth to the factual situation in the instant case we believe that the court's finding that appellant was estopped from availing himself of the statute of frauds is supported by the evidence and the law. The court was fully justified in concluding that appellant had made the offer for the beans and knew that respondents had accepted it, that respondents continued to rely on appellant's renewed assurances that he would complete the transaction from about March 1st to September 10th; that relying upon appellant's assurances respondents refrained from selling the beans to others and altered their position to their damage and loss. Under such circumstances the court had a right to believe that appellant was attempting

to use the statute of frauds as a sword and not as a shield."

That such affirmative acts relied upon by the opposite party to its detriment will give rise to an estoppel, is recognized in the case of *Georgia Peanut Co. v. Famo Products Co.,* 96 Fed. 2d 440, 441-442. To the same effect see *Pruitt v. Fontana,* 143 C.A. 2d 675, 687, 300 Pac. 2d 371, 379 and *Hunt Foods v. Phillips,* 248 F. 2d 28, 31-33.

THE SAMPLE WAS APPROVED.

The bought and sold notes recite that the sale is "subject to approval by buyer of two bags now en route as samples to buyer." As heretofore set forth, the conduct of the parties clearly recognizes the existence of a contract, and in so doing necessarily accepts as a fact that the sample had been approved. It was approved.

The 200 pound sample was requested so that appellee could make a production test of the kernels, manufacture them into paste and make macaroon cookies from the paste (R. 158-159, 282-283). The test was satisfactory and the sample was approved. The approval of the sample had absolutely nothing to do with the percentage of broken kernels that could or would be present in the delivery. This was clearly brought out by Mr. Kaplan, Mr. Engell and Mr. Ehrenfeld. Mr. Kaplan made no test with reference to the weight of broken kernels in the sample. He

observed, however, that it apparently contained more than permissible in a delivery of regular apricot kernels, and called this to the attention of Mr. Sullivan.

As explained by both Mr. Engell and Mr. Ehrenfeld, the sample received by appellee was what is known in the trade as a type sample, furnished to show the quality of the merchandise and nothing else (R. 241-243, 245-246, 265-266). Both of these witnesses testified that the sample furnished in this case was a type sample representative only of the quality of the nut meat, having absolutely nothing whatsoever to do with the percentage of broken kernels that could be present in the delivery. If there were no broken kernels in such a sample, the seller could still deliver broken kernels up to 5% by weight, and if there were more than 5% of broken kernels in the sample, the seller could deliver no more than 5% by weight.

We again emphasize that not only is this the testimony, but it is the undisputed and uncontradicted testimony. Appellant did not introduce an iota of evidence to refute the existence of the trade custom or the fact that the sample furnished was a type sample that had absolutely no bearing on the percentage of broken kernels.

Appellee approved the sample and appellant knew that it approved the sample. Its conduct is inconsistent with any other inference.

THE EXISTENCE OF THE TRADE CUSTOM AS FOUND BY THE TRIAL COURT WAS PROVED BY UNDISPUTED TESTIMONY. THIS CUSTOM WAS A PART OF THE CONTRACT, BINDING ON BUYER AND SELLER, WHETHER EXPRESSED OR IMPLIED.

That there is and for over thirty years has been a well established trade custom that regular apricot kernels can have no more than 5% by weight of broken kernels was proved by the testimony of Mr. Kaplan, Mr. Engell and Mr. Ehrenfeld as well as by the documentary evidence (R. 210, 283-284, 232-234, 256-259). It is the trade practice to sometimes express the tolerance in the contract and sometimes not to express it, but whether expressed or not expressed, regular apricot kernels can contain no larger percentage of broken kernels.

In treating this point, the appellant states that the testimony of Mr. Engell is in conflict with that of Mr. Kaplan and Mr. Ehrenfeld, in that Mr. Engell testified that it is the practice to include a clause covering this tolerance in the written contract. If there were such a conflict in the testimony it would be immaterial. It is sufficient if there is substantial evidence in support of the finding that is attacked. However, the conflict does not exist. Mr. Engell testified:

> "Now the time of negotiations or confirmation of sale—it may be made by wire or telegram, and reference to that five per cent is not always in the telegram or wire because it is implied that regular apricot kernels would be shipped with not more than five per cent broken kernels by weight. It is established custom in the industry." (R. 233.)

Mr. Engell also gave the following testimony:

"Q. Now, Mr. Engell, you testified that it is the practice, and I think your documents will show, for California Packing Corporation to expressly include in its contracts the tolerance of five per cent limitations of broken kernels by weight. Whether or not such a clause is expressly included in the contract, Mr. Engell, is it a fact that the same tolerance is implied whether expressed or unexpressed.

A. That is correct." (R. 251.)

Mr. Engell has been with California Packing Corporation for about 28 years and Mr. Ehrenfeld has been with Rosenberg Bros. & Co. for about 40 years. Mr. Ehrenfeld testified as follows:

"Q. Let me ask you, Mr. Ehrenfeld, does this custom apply in the case of all sales of regular apricot kernels without setting forth the qualification in the contract?

A. It does." (R. 257.)

The witness testified that it is generally the practice of Rosenberg Bros. & Co., which is the largest handler of apricot kernels (R. 255), not to include any mention of the tolerance. The witness was shown Exhibit 43, which is a contract dated September 23, 1955, between Rosenberg Bros. & Co. Inc. as seller, and appellee as buyer, of regular apricot kernels. There is no mention of the tolerance in this contract. The contract was shown the witness and the following question asked and answer given:

"Q. And whether it mentions that or not, that tolerance would be implied, is that correct?

A. It would be implied." (R. 259.)

Both Mr. Engell and Mr. Ehrenfeld testified that the Dried Fruit Association of California will not issue a certificate passing a delivery of regular apricot kernels in which the percentage of broken is in excess of 5% by weight (R. 233, 260).

Exhibit 44 (R. 296) is a contract dated August 26, 1955, for regular apricot kernels in which Sewell S. Brown & Company is the seller and appellee the buyer, and in which the tolerance is not mentioned.

Exhibit 45 (R. 297) is a contract for regular apricot kernels wherein Mayfair Packing Co. is seller and appellee buyer, and in which there is no mention of the tolerance.

Exhibit 46 (R. 298) is a contract in which the California Prune and Apricot Growers Association is seller. The tolerance is mentioned in the broker's bought note and omitted in the formal agreement.

The testimony and the evidence conclusively demonstrate that according to a long and well established custom of the trade, regular apricot kernels cannot include more than 5% of broken by weight; that this custom is a part of every contract; that it is sometimes included as an express term of the contract, sometimes and probably more frequently, omitted, but whether expressed or implied it is always a part of the contract.

Appellant argues that the custom should not be applicable in this case because this was the first sale of apricot kernels that appellant had made and that it was ignorant of the custom. There are two answers to this contention. Appellant was not ignorant of the

custom, and if it were ignorant, it would still be binding upon it.

We have already pointed out that on receiving Prince, Keeler's letter of September 8, 1955, (Ex. 10, R. 94), Mr. Sternau made no inquiry to ascertain whether this tolerance was a "recognized condition of sale of this particular item;" (R. 96, 316-317), never questioned nor disputed that this was the fact and did not reply to this letter until September 21, 1955 (Ex. 11, R. 98). In this reply, which was written immediately after the fire, Mr. Sternau does not question the existence of the trade custom but states that the "packer" "is having a very difficult time in shelling these and would like to get out of this contract this season." The only true statement made in this letter was the fact of the desire to get out of the contract. The "packer", Bonzi, had never shelled or attempted to shell these or any other kernels (R. 319). The assistance of California Packing Corporation to shell the kernels was refused (R. 323) and there was just as much sincerity in the letter of Mr. Sternau as in the letter of the attorneys written on behalf of Bonzi (Ex. 32, R. 134) in which it is stated that "Mr. Bonzi is of the opinion that he is unable to crack any apricot pits during this season and thus is unable to deliver any apricot kernels to you or to your purchaser, the American Almond Products Co. Inc." This letter was written after Mr. Engell had actually gone to the premises of Mr. Bonzi to make arrangements for California Packing Corporation to do the cracking and Mr. Engell saw the uncracked pits strewn on the premises of Bonzi (R. 238-241). Furthermore, as

testified by both Mr. Engell and Mr. Ehrenfeld, the reduction of the broken pieces to a maximum of 5% is purely a mechanical process of taking out and removing any excess (R. 235, 260).

Again, although Mr. Sternau testified that this was the first sale of apricot kernels made by appellant, he admitted that appellant had for years been engaged in the same business as that of appellee, that of making the kernels into paste for the bakery trade, and that in carrying on this trade appellant had necessarily made innumerable purchases of apricot kernels (R. 314-315). Appellant still had on its premises machinery for the manufacture of the paste when Mr. Kaplan called on November 15, 1955, and Mr. Sternau offered to sell this machinery to appellee (R. 191-192). Moreover, Mr. Sternau did not testify that appellant did not know about the custom. The full extent of his testimony was that appellant was new in the business of selling apricot kernels.

In the second place, the general trade custom would be a part of the contract and binding upon appellant, whether or not it knew of the custom. This principle is clearly set forth by the Supreme Court of California in the case of *Miller v. Germaine Seed Etc. Co.,* 193 Cal. 62, 69-70, 222 P. 817, 820:

> "The rule that a person will be presumed to have contracted with reference to a general custom or usage whether he knew of that custom or not has frequently been invoked. In *Steidtmann v. Joseph Lay Co.,* 234 Ill. 84 N.E. 640), it was said (pp. 88, 89): 'A person entering into a contract in the ordinary course of business is

presumed to have done so in reference to any existing general usage or custom relating to such business. (*Collins Ice Cream Co. v. Stephens,* 189 Ill. 200 (59 N.E. 524); *Chisholm v. Beaman Machine Co.,* 160 Ill. 101 (43 N.E. 796); *Leavitt v. Kennicott,* supra.) And this is so whether he knew of the custom or not. (*Samuels v. Oliver,* 130 Ill. 73 (22 N.E. 499); *Taylor v. Bailey,* 169 Ill. 181 (48 N.E. 200); *Lyon v. Culbertson,* 83 Ill. 33; *Doane v. Dunham,* 79 Ill. 131; *Bailey v. Bensley,* 87 Ill. 556.)"

See also *Pastorino v. Greene Bros.,* 90 Cal. App. 2d 841, 204 P. 2d 386, 370.

It is apparent how absurd it would be if this were not the law. When Mr. Sternau offered to sell the apricot kernels to appellee, he stated that the price would be "competitive" (R. 73, 80, 42). The price of 17½c per pound was based on the opening price for regular apricot kernels. At the same time that appellee made the purchase from appellant it made other purchases of regular apricot kernels at exactly the same price (Exs. 37, 44, 45, 46, R. 157, 296, 297, 298). All those selling regular apricot kernels were bound to deliver and did deliver not in excess of 5% by weight of broken kernels. The suggestion that anyone could assume to engage in this trade, contract to sell regular apricot kernels at the prevailing market price and yet not be bound to deliver a product equal in quality to that called for by that price, on the basis that he was new at the business and did not know the quality called for, is nothing less than absurd. The absurdity is demonstrated by the testi-

mony of Mr. Sternau (R. 325, 326). If anyone engages in a business he is bound to know and is bound by the well-established customs applicable to that business.

The contention that the custom is not a part of the contract because Mr. Kaplan expressed a desire that it be added as a part of the formal contract, is equally unsound. The custom existed and was applicable whether expressed or implied. Appellee purchased regular apricot kernels. It agreed to pay the price of regular apricot kernels. It expected and was entitled to delivery of regular apricot kernels. An excess of broken kernels would render the delivery unusable for appellee's purposes. Broken kernels have only a fraction of the value of whole kernels and are usable only for pressing of oil. Appellant did not become entitled to deliver anything other than regular apricot kernels because Mr. Kaplan requested that the exact description of regular apricot kernels be included in the formal contract, if one was executed, for that is all his request amounted to.

THE EXISTENCE OF THE CONTRACT WAS NOT DEPENDENT ON THE EXECUTION OF A FORMAL WRITTEN AGREEMENT.

This, of course, is a question of intent to be determined from all the evidence in the case, and the trial Court has found adversely to appellant's contention. The evidence fully supports the finding.

The broker's memorandum recites upon its face "this memorandum shall be subordinate to a more

formal contract if and when such a contract is executed; in the absence of such contract, this memorandum represents the contract of the parties."

No more formal contract was executed; the memorandum was accepted and retained by both parties, and according to its terms represents the contract of the parties.

It is fundamental that there is no more reliable rule by which to determine the intent of the parties than their own conduct.

Appellant's repeated and consistent recognition of the existence of this contract and promises to perform it completely disprove any intention that there should not be a contract unless a formal instrument was executed. One cannot blow hot and blow cold. One cannot recognize and promise to perform a contract and at the same time deny its existence.

In the case of *Gibson v. De La Salle Institute,* 66 Cal. App. 2d 609, 630, 152 P. 2d 774, 786 wires of both buyer and seller recited that a formal contract would be prepared and signed. None was prepared or signed and the Court said (page 630):

> "It is said in 17 Corpus Juris Secundum 391, that whether an informal agreement which, according to the understanding of the parties, is to be reduced to writing, takes effect as a complete contract at once, or only when a formal written contract is executed, depends upon the intention of the parties as construed from the facts of a particular case. In *Thompson v. Schurman,* 65 Cal. App. 2d 432, 440 (150 P. 2d 509), this court held that where the parties agree upon the terms

> and conditions of a contract with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is thereafter to be prepared and signed does not alter the binding validity of the original contract; and that whether an oral agreement should take effect forthwith as a completed contract depends upon the intention of the parties, and that such intention is to be determined by the surrounding facts and circumstances of each particular case. (Also see *Billings v. Wilby,* 175 N. C. 571 (96 S. E. 50, 51), and cases there cited).

In the case of *Lawrence v. Milwaukee etc., R. Co.,* 84 Wisc. 427 (54 N.W. 797), which the Court cites and quotes from in the *Gibson* case (p. 625), although the correspondence between the parties recited that a contract would be prepared, the Court "considered the subsequent conduct of the parties shown by parol evidence as indicating that both parties supposed that a contract existed."

In the case at bar the conduct of all the parties, appellant, its counsel, Prince, Keeler & Company as well as appellee, shows conclusively that all parties regarded the contract as existing and in effect.

Mr. Kaplan gave as reasons that he did not consider the execution of any more formal contract as necessary, the following:

> "The Court. What reasons do you have in mind?
>
> A. Number one: To the best of my recollection I had received similar bought and sold—or in my case I would receive bought note copies. To the best of my recollection Prince-Keeler had

confirmed several purchases I had made from Sternau—Sunset-Sternau Company—using different forms of such confirmation. That is point one.

Point two is that I—as a buyer, American Almond, had made many purchases of apricot kernels from other sellers in California where this broker's confirmation was the sole written evidence of a contract without any subsequent confirmation of a more formal contract.

It was very normal for me to assume a great possibility that this would be the final written confirmation, because on its face it reads, among other things, on the top, number one:

'If incorrect, advise immediately.'

Number two, on the bottom—if I can find it here in a moment—under the clause of arbitration on this very document:

'Any controversy or claim arising out of or relating to this contract shall be arbitrated before the Association of Food Distributors, Incorporated, New York City. This memorandum shall be subordinate to a more formal contract if and when such contract is executed. In the absence of such contract, this memo represents the contract of the parties; seller guarantees to conform to National Pure Food Laws.'

And, as I said previously, I had many purchases of apricot kernels from California where such a broker's memorandum was the sole written confirmation." (R. 205-206)

THERE IS MUTUALITY OF REMEDY.

It is difficult to understand appellant's contention in this respect. Certainly appellee, over and over

again, just as appellant, recognized the existence of this contract, offered performance and demanded performance. This was done repeatedly, both orally and in writing. The following question and answer were given:

> "Q. (By Mr. O'Connor). Mr. Kaplan, did you ever sign or did any other officer of American Almond Company ever sign any writing with Sunset-Sternau Food Company for the purchase from Sunset of 75 tons of apricot kernels in the year 1955?
>
> A. I have signed some writings, yes. There are letters. If you refer to the word 'writings', we have a great deal of correspondence between the parties here, all of which are writings referring to such a transaction, and we have signed many such writings—at least I have." (R. 218).

The writings referred to are in evidence.

If appellant had made a tender or if appellee had failed or refused to perform, as did appellant, a right of action would certainly have existed.

On page 35 of its opening brief, appellant states that the record reveals that appellant was unable to meet the "5% clause", and that this was uncontradicted. This would not be a defense if it were true, but it is not true. The claim of inability to meet the 5% clause was sham and a mere excuse first to attempt to get out of the contract and thereafter for delay. Appellant was given the opportunity to have the California Packing Corporation do the cracking and did not have sufficient interest to even contact the California Packing Corporation (R. 323).

It is also the law that the writing, if one is required, need only be signed by the party to be charged, and lack of mutuality is not a defense.

Cowan v. Tremble, 111 Cal. App. 458, 462-463, 296 Pac. 91, 93.

"Moreover, contracts within the statute of frauds need be subscribed only by the party to be charged or his agent (Civ. Code, sec. 1624), and may be enforced notwithstanding they are not signed by the plaintiff or his authorized agent *(Cavanaugh v. Casselman,* 88 Cal. 542 (26 Pac. 515); *Scott v. Glenn,* 98 Cal. 168 (32 Pac. 983)). Nor does this rule render the contract liable to the objection of a lack of mutuality, for by bringing the suit the plaintiff binds himself to abide by the judgment of the court *(Harper v. Goldschmidt,* 156 Cal. 245 (134 Am. St. Rep. 124, 28 L.R.A. (N.S.) 689, 104 Pac. 451); *Allen v. Dailey,* 92 Cal. App. 308 (268 Pac. 404); Williston on Contracts, sec. 140, p. 314)."

CONCLUSION.

It is respectfully submitted that the findings of the trial Court are fully supported by the evidence and that the judgment should be affirmed.

Dated, San Francisco, California,
April 22, 1958.

Respectfully submitted,
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